

A Watershed Moment? What Comes Next for the FTC in the Wake of *AMG*

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IT IS NOT OFTEN THAT THE NATION'S highest court completely repudiates a federal agency's long-standing view of its authority. Yet that is exactly what occurred when the Supreme Court, in late April of this year, issued its unanimous decision in *AMG Capital Management, Inc. v. FTC*,¹ bringing an end to decades of case law embracing the Federal Trade Commission's long-standing interpretation of Section 13(b) of the FTC Act. That provision, adopted by Congress in 1973, authorizes the FTC in certain circumstances to seek preliminary and permanent injunctions in federal court, but makes no mention of monetary remedies. Since the 1980s, however, the FTC has been invoking Section 13(b) as authority to seek and recover equitable monetary relief, such as restitution based on alleged consumer harm and disgorgement of alleged illicit profits. In the intervening years, the Commission came to rely on Section 13(b) as its principal vehicle for obtaining monetary relief in both consumer protection and antitrust cases. Through a combination of settlements and court judgments, over the years the agency has collected billions of dollars from corporate and individual defendants, citing to Section 13(b) as the sole basis for relief.

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The collapse of the FTC's Section 13(b) program is a modern-day legal spectacle to which the authors and the readers of this publication have had a front-row seat. In 2013, we argued before the Ninth Circuit in *FTC v. Commerce Planet, Inc.*,² that the plain text and legislative history of Section 13(b) support one conclusion—that the provision authorizes injunctive relief only. The Ninth Circuit disagreed. “Although this provision mentions only injunctive relief,” the court's 2016 decision held, “it also empowers district courts to grant ‘any ancillary relief necessary to accomplish complete justice,’ including restitution.”³

The Ninth Circuit's ruling in *Commerce Planet* was not an outlier. At that point in time, seven other circuits had held that Section 13(b) authorized the FTC to seek and obtain monetary relief in connection with requests for an injunction, and no court of appeals had ruled otherwise.⁴ A former Director of the FTC's Bureau of Consumer Protection and advocate for a broad interpretation of the agency's Section 13(b) authority published an article in the Fall 2016 issue of *ANTITRUST* in which he summarized the uniform string of appellate rulings favoring the FTC's position and predicted that the law “is not going to change.”⁵ Even the title of that article signaled the view that critics hoping to establish limits on the FTC's authority were fighting a lost cause.

We expressed a contrary view in the Spring 2018 issue of *ANTITRUST*, noting the strained statutory reading required by the Commission's position, and that the Supreme Court's 2017 ruling in *Kokesh v. SEC*⁶ raised questions about the SEC's disgorgement authority that arguably could be extended to the FTC.⁷

The next shoe to drop following *Kokesh* came later in 2018 when Ninth Circuit Judge Diarmuid O'Scannlain took the unusual step of writing a “special concurrence” to his own majority opinion in *FTC v. AMG Capital Management, LLC*.⁸ In that opinion, Judge O'Scannlain, joined by another member of the panel, recognized that *Commerce Planet* was controlling circuit authority on the Section 13(b) issue, but nonetheless advocated that the Ninth Circuit reconsider that ruling en banc, suggesting that decisions upholding the FTC's monetary relief authority reflected “an impermissible exercise of judicial creativity” that “contravenes the basic separation-of-powers principle.”⁹

The Ninth Circuit declined the invitation to reconsider *Commerce Planet*, but in 2019 the Seventh Circuit in *FTC v. Credit Bureau Center*¹⁰ picked up where Judge O'Scannlain left off, becoming the first federal appeals court to rule against the FTC on this issue, consciously departing from the “consensus view” of its “sister circuits,”¹¹ and thereby setting up the circuit split that would lead to the Supreme Court agreeing to hear the issue.¹²

The Supreme Court's unanimous reversal is a stunning legal development, but the focus of this article is less on how we got to this point and more on what happens next. After exploring a bit further the run-up to *AMG* and the decision

itself, the balance of the article offers thoughts on how this decision may impact pending FTC enforcement actions and the agency's future enforcement strategies, and what may come of the FTC's calls for new congressional action to supplement the agency's remedial powers in the wake of *AMG*.

The Rise and Fall of the FTC's Use of Section 13(b) to Obtain Monetary Remedies

After the FTC began asserting that the words "permanent injunction" in Section 13(b) authorized the agency to obtain equitable monetary remedies, such as disgorgement and restitution, the issue filtered its way up through the courts, and the agency had tremendous success defending its position. The Seventh Circuit's 1989 decision in *FTC v. Amy Travel Services, Inc.*,¹³ was the first appellate ruling to confront the issue, and the court embraced the FTC's broad interpretation of its statutory authority.¹⁴ In time, seven other circuits would join suit. By the late 1990s, Section 13(b) became the primary mechanism by which the Commission obtained monetary relief in cases not involving enforcement of existing orders or rules.

The first sign that the FTC's position on Section 13(b) might be in jeopardy came with the Supreme Court's 2017 *Kokesh* decision. In that case, the Court held that disgorgement obtained by the SEC constitutes a "penalty" subject to a five-year statute of limitations under 28 U.S.C. § 2462 when the agency acts pursuant to statutory provisions similar to Section 13(b) of the FTC Act.¹⁵ Although the holding in *Kokesh* was limited to the SEC and involved a statute of limitations question, the fact that the Court held that the SEC's disgorgement remedy constituted a "penalty" signaled that disgorgement may not be available to agencies seeking equitable relief, given that the Court had previously held that a court in equity may not enforce a "civil penalty."¹⁶

Shortly after *Kokesh* was decided, the defendants in *AMG* filed a brief with the Ninth Circuit citing the decision in support of their challenge to a \$1.3 billion monetary judgment that the FTC obtained under Section 13(b). The *AMG* case concerned payday loan practices, and the FTC obtained this relief as restitution for the alleged consumer harm caused by the defendants' "unfair or deceptive practices."¹⁷ The *AMG* defendants urged the Ninth Circuit to reconsider "[t]he availability of monetary awards under Section 13(b)—regardless whether a court labels them 'damages' or 'equitable restitution,'" and to apply the reasoning from *Kokesh* to "determine whether the FTC improperly uses Section 13(b) to pursue penal monetary relief under the guise of equitable authority."¹⁸ As noted above, the panel declined to do so, as it was bound by the earlier Ninth Circuit *Commerce Planet* decision, but Judges O'Scannlain and Bea penned a special concurrence criticizing the basis of *Commerce Planet* and calling for en banc review.¹⁹ After the Ninth Circuit declined en banc review, *AMG* filed a petition for certiorari.

Shortly thereafter, in August 2019, the Seventh Circuit in *Credit Bureau* reversed its heavily cited *Amy Travel* decision, becoming the first federal circuit court to hold that the FTC

cannot obtain monetary relief under Section 13(b), and the court vacated a \$5.26 million judgment in favor of the Commission.²⁰ After en banc review was denied, the FTC sought certiorari.

The Supreme Court granted certiorari in both *AMG* and *Credit Bureau* in July 2020. The Court subsequently vacated its grant of certiorari in *Credit Bureau*, leaving *AMG* as the vehicle through which it would address the scope of the FTC's Section 13(b) remedial authority.

In September 2020, the Third Circuit, in a pharmaceutical antitrust case, followed the Seventh Circuit's holding and vacated a \$448 million judgment obtained by the FTC under Section 13(b), expanding the circuit split.²¹

The Court heard oral argument in *AMG* on January 13, 2021.

The AMG Decision

On April 22, 2021, a unanimous Supreme Court held that Section 13(b) does not authorize the FTC to seek—or a court to award—equitable monetary relief such as restitution or disgorgement.²² The Court rejected the FTC's interpretation of the statute's reference to obtaining a "permanent injunction" and concluded that an "injunction" is not the same as an award of equitable monetary relief. Instead, the Court held that Section 13(b)'s language and structure indicate that the statute's reference to "permanent injunction" refers to "prospective, not retrospective" relief to "stop[] seemingly unfair practices from taking place while the Commission determines their lawfulness" in an administrative proceeding.²³

The Court cited the structure of the FTC Act more broadly as corroboration for its conclusion. The Court explained that Congress would not have subsequently enacted other provisions in the FTC Act that explicitly authorize "conditioned and limited monetary relief" (namely, Sections 5 and 19 of the FTC Act, which impose, among other things, higher standards of proof and a statute of limitations) if the Act already allowed the FTC to "obtain that same monetary relief and more" without limits via Section 13(b).²⁴

These structural concerns were previewed during the oral argument. Justice Gorsuch expressed the Court's "core concern" that the FTC's interpretation of Section 13(b) "render[ed] those protections [of Section 19] superfluous" and provided the Commission with "very little incentive . . . to ever comply with them."²⁵ Justice Kavanaugh characterized the crux of the case as one of "separation of powers," insofar as the Commission had "stretch[ed] the statutory language" such that it had resulted in a "transfer of power from Congress to the Executive Branch."²⁶ Justice Breyer likewise noted during argument that the FTC had initially indicated it would "only use [Section 13(b) to obtain monetary relief] in exceptional cases" but had instead proceeded to use it with "great frequency," creating a regime under which companies are "hit . . . with bad damages" before their conduct is even found to be in violation of the FTC Act.²⁷

The Court's opinion addressed two principal FTC counterarguments. First, the Commission argued that prior Supreme Court precedent—*Porter v. Warner Holding Co.*²⁸ and *Mitchell v. Robert DeMario Jewelry, Inc.*²⁹—“set forth a universal rule of interpretation” that “the traditional equitable authority to grant an injunction includes the power to grant restorative monetary remedies.”³⁰ Second, the agency argued using Section 13(b) to obtain monetary relief is of “policy-related importance” because it keeps wrongdoers from retaining “profits earned at the unjustified expense of consumers.”³¹ The Court rejected both arguments. In response to the first point, the Court distinguished *Porter* and *Mitchell*, which involved different statutes. It noted that both decisions had analyzed the relevant statutes and, unlike here, did not find evidence that Congress had expressly or impliedly precluded a court from ordering restitution in the exercise of its equity jurisdiction.³² With regard to the policy import of using Section 13(b) to seek monetary remedies, the Court pointed out that the Commission still had available avenues for obtaining restitution, referring to Sections 5 and 19 of the FTC Act, and that the Commission had the option of “ask[ing] Congress to grant it further remedial authority.”³³

Accordingly, the Court reversed and remanded the case for further proceedings.

The Impact of the AMG Decision on Pending Section 13(b) Cases

At the time *AMG* was decided, the Commission was a plaintiff in more than forty cases seeking monetary remedies pursuant to Section 13(b). How these pending matters are impacted by *AMG* will naturally vary, depending upon the strategies and positions taken by the parties and rulings by the presiding courts.

Some pending Section 13(b) matters include claims under other statutes that arguably independently permit the agency to obtain monetary relief. *FTC v. Simple Health*,³⁴ which is pending in the Southern District of Florida, is one example. In *Simple Health*, the FTC alleges that the company and its owner deceptively marketed limited indemnity health plans as comprehensive health insurance. The FTC's complaint seeks monetary relief pursuant to both Section 13(b) and the portion of Section 19 of the FTC Act permitting the FTC to obtain monetary remedies in rule violation cases. On April 27, 2021, five days after the Supreme Court issued the *AMG* decision, the FTC filed a Notice of Supplemental Authority alerting the district court to *AMG* and asserting that “the FTC remains able to obtain the [monetary] relief it seeks” because “Section 19 of the FTC Act [...] empowers the Court to grant relief for violations of rules,” such as the FTC's Telemarketing Sales Rule, “including, but not limited to rescission or reformation of contracts, and the refund of money or return of property.”³⁵ In cases such as this, *AMG* may have little or no impact on the matter substantively or procedurally because the Commission arguably

can obtain the monetary relief it seeks without relying on Section 13(b).

In contrast to cases like *Simple Health*, where other statutory authority for monetary relief may exist, at the time *AMG* was decided there were, according to the Commission, approximately 24 pending cases in which the FTC relied exclusively on Section 13(b) as authority for seeking monetary relief. Then-Acting FTC Chair Rebecca Slaughter testified during an April 27, 2021, House Committee on Energy & Commerce hearing that a total of \$2.4 billion is at stake in these cases.³⁶

AMG had a near-immediate impact on some of these matters. For example, only four days after the Supreme Court decided *AMG*, the Ninth Circuit in *FTC v. Robb Evans & Association*³⁷ vacated a preliminary injunction entered to preserve assets to satisfy a potential monetary remedy under Section 13(b) because *AMG* eliminated the possibility of such a remedy. In addition, defendants can be expected to push to narrow the scope of ongoing discovery to exclude information relating solely to restitution or disgorgement, such as data production and expert analyses pertaining to the amount of consumer harm or the extent to which defendants profited from challenged practices.

Absent new statutory authority for the FTC in the near future, *AMG* may—and almost certainly will—also impact the long-term course and strategies of the parties in many of the FTC's pending Section 13(b) actions.

First, particularly with regard to recently filed matters, the FTC could conceivably pivot to an administrative litigation strategy, with the goal of obtaining monetary relief through Section 19 of the FTC Act. This process would require the FTC to (1) file and prevail in an administrative action subject to review by a federal appeals court, and (2) then file a subsequent action in federal court under Section 19. In that second action, if the Commission shows a “reasonable man would have known under the circumstances [the challenged conduct] was dishonest or fraudulent,” the Commission can obtain monetary relief broadly similar to the remedies it obtained as equitable monetary relief under Section 13(b) prior to *AMG*. Yet the Commission may not be keen to pursue this strategy. As then-Acting Chair Slaughter emphasized repeatedly in recent congressional testimony, this process is more complex and resource-intensive for the agency, and the “dishonest or fraudulent” bar is high.³⁸

Second, *AMG* may significantly increase the likelihood of settlements in a number of the pending cases. In many of these cases, the FTC's monetary demand was the principal driver of the litigation from the inception; in other words, had the FTC only been seeking injunctive relief, the matter may have been resolved short of litigation. And even if the parties do have material differences in terms of the scope of injunctive remedies, these are issues that can often be resolved after litigation, particularly when the court actively encourages the parties to settle. While courts obviously cannot impose settlement on the parties, they can and often

do strongly encourage consensual resolution by referring the parties to mediation, by signaling likely rulings on pivotal issues, and perhaps most effectively by moving matters rapidly towards trial.

Finally, there may be some pending Section 13(b) cases in which the *AMG* decision has a more tangential impact. In some FTC actions, while monetary relief is on the table, it is the FTC's demands for injunctive relief that most concern the defendant. This may be particularly true where a loss to the FTC could result in an injunction of indefinite duration that would place the defendant at a significant disadvantage vis-à-vis its marketplace rivals. In such cases, while the scope of discovery and trial may narrow somewhat, the path of the litigation through trial may not be materially changed by the FTC's loss of monetary relief authority.

The Impact of *AMG* on the Future of FTC Enforcement, Absent Congressional Action

In addition to its effect on pending litigation and absent new legislation addressing the issue, *AMG* is likely to significantly affect the FTC's enforcement strategies, particularly in consumer protection matters where the Commission has placed heavier reliance on Section 13(b) monetary relief claims. Although the strategic impact on antitrust matters may be more limited, some of the agency's largest recoveries under Section 13(b) in recent years have been in anticompetitive conduct cases, such as the \$1.2 billion settlement in *FTC v. Cephalon, Inc.*³⁹

Administrative Litigation and Section 19 of the FTC Act. As noted above, the FTC can obtain monetary remedies through Section 19 of the FTC Act. Assuming no new statutory authority, the FTC almost certainly will file more cases administratively, with the plan of obtaining monetary remedies pursuant to Section 19 if the evidence and liability ruling from the administrative action supports such a filing. We are aware of at least one instance, which occurred very shortly before the *AMG* decision was issued, in which the FTC Staff transparently shifted its enforcement recommendation to the Commissioners in a pending investigation from the filing of an action in federal court under Section 13(b) to the filing of an administrative action. We expect such shifts to occur in many pending and future FTC investigations.

Then-Acting Chair Slaughter and others have commented that the procedure contemplated by Section 19—an administrative action followed by a separate federal suit—is long and cumbersome. This argument is often supported by the timeline in *FTC v. Figgie, International, Inc.*,⁴⁰ the last litigated Section 19 case, where the process took more than a decade. Notably, however, in 2009, at the urging of former Commissioner Tom Roush, the Commission overhauled its administrative litigation procedures to dramatically tighten the process's timeline.⁴¹ Thus, it is unclear whether using the Section 19 process would materially slow the resolution of matters relative to the timelines in recent Section 13(b)

matters involving monetary remedies. The more salient difference may be the higher “dishonest or fraudulent” burden of proof applicable in Section 19 proceedings. This standard presumably would be easily met in fraud cases. But in antitrust matters, technical advertising substantiation cases, and privacy and data security matters, among other types of cases involving legitimate companies offering products and services consumers value, this standard may be quite difficult for the Commission to meet.

Leveraging Order Enforcement. We expect the FTC will increase its focus on, and shift resources to, enforcement of its existing orders. Breach of an administrative order can permit the FTC to obtain monetary civil penalties,⁴² and breach of a federal court order may be prosecutable through contempt sanctions. Even before the Court decided *AMG*, then-Acting Chair Rebecca Slaughter testified before the U.S. Senate Committee on Commerce, Science, and Transportation that the Commission will be “reviewing comprehensively [the FTC's] past consent decrees,” looking for violations, and further, that the Commission will “prioritize the consent decrees [it has] with the largest companies where the biggest harm is at stake.”⁴³ At the same hearing, Commissioner Chopra emphasized that the Commission “must implement major changes when it comes to stopping repeat offenders,” including “mak[ing] it clear that FTC orders are not suggestions.”⁴⁴ Without the ability to seek monetary relief for first-time offenders through Section 13(b), order enforcement efforts are likely to receive even greater attention.

A logical complement to this strategy would be to utilize shorter, more targeted investigations aimed at securing injunctive-relief-only orders against first-time offenders. Conducting investigations solely focused on liability issues, and setting aside discovery and analysis focused on quantifying the defendant's revenues or profits, or the amount of consumer harm—inherently data intensive issues—would speed investigations. Focusing solely on injunctive relief could also reduce the degree to which companies resist settlement. Indeed, in our experience, the existence and size of a monetary payment has often been the sticking point in settling Commission investigations prior to litigation. Shorter, less-resource-intensive investigations would permit the agency to conduct a larger number of investigations. This correspondingly would lead to an increase in the number of outstanding FTC orders, and thereby expand the reach and impact of the Commission's order enforcement program.

Increased Rule Enforcement and Rulemaking. We also expect *AMG* to increase the FTC's interest in pursuing actions against companies violating the dozens of active rules promulgated by the FTC, such as the Children's Online Privacy Protection Rule (COPPA),⁴⁵ or more industry-specific rules such as the Health Breach Notification Rule⁴⁶ or the Contact Lens Rule.⁴⁷ Like actions enforcing prior Commission orders, actions under promulgated rules allow the FTC the opportunity to impose monetary civil

penalties on defendants, and the FTC signaled increased interest in rule enforcement even before the *AMG* decision was issued. For example, the Commission's settlement with Flo Health, Inc., a matter involving alleged privacy violations, was accompanied by statements from Commissioners Slaughter and Chopra expressing that the action should have included an allegation that the company's conduct violated the Health Breach Notification Rule, a rule that has not been previously asserted by the Commission in an enforcement action.⁴⁸

In addition, the FTC is actively looking to promulgate more rules, enabling even more rule-enforcement actions. In express anticipation of the *AMG* decision, in March of this year then-Acting Chair Slaughter announced the creation of a new rulemaking group within the FTC's Office of the General Counsel that can create clearer rules for companies regarding what constitutes "unfair or deceptive practices," and more opportunities to secure civil penalties through enforcement of these new rules.⁴⁹ The Commission's announcement also explicitly referenced the possibility of rules addressing "our increasingly concentrated economy," suggesting that the Commission may be considering new rules in the antitrust arena specifically.⁵⁰

Privacy is another area in which we suspect the Commission may promulgate new rules to delineate what it views as unfair practices. To date, the FTC has largely relied on its general authority pursuant to Section 5 of the FTC Act to challenge deceptive practices based on alleged gaps between a company's statements relating to its privacy practices, on the one hand, and its actual practices, on the other hand. And the FTC has not sought monetary relief in these matters. Rulemaking could focus on establishing required disclosures or affirmative consents for specific kinds of data sharing or data use, in addition to creating an arguable avenue for the agency to obtain monetary remedies in the event of rule violations in certain instances.

Collaboration with Other Enforcers. In matters where the Commission believes monetary remedies are appropriate and other routes to such relief are unavailable or unattractive to the agency, another enforcement option is to team up with other federal agencies, state attorneys general, or local law enforcers with authority to obtain monetary remedies. There is a long history of the Commission working with other federal and state agencies, including in enforcement actions involving large monetary payments—the Volkswagen *Dieselgate* matter being one prominent example.⁵¹ In anticipation of the *AMG* decision, Commissioner Chopra vocally urged the FTC to leverage State Attorneys General partnerships to secure monetary awards.⁵² And on May 19, 2021—less than a month after *AMG* was published—the FTC filed a consumer protection case in partnership with five state Attorneys General and two county district attorneys invoking various state laws to seek monetary remedies.⁵³

While we expect that the FTC may collaborate more frequently with other enforcers to seek monetary remedies in

federal court, we can imagine hesitancy from the Commission in pursuing this strategy too broadly. The Commission may have an understandable desire to exert sole control over certain cases. Other enforcers may have divergent goals or prefer different litigation strategies or venues. In addition, some degree of logistical complications inevitably accompanies inter-regulator coordination.

The Potential for New Statutory Authority

The largest question left looming by *AMG* is whether Congress will step in, and if so, what new authority will look like. One key issue is whether new statutory authority merely reinstates the prior interpretation of Section 13(b) that existed in certain lower courts, or whether the FTC will be required to meet a heightened burden of proof along the lines of the Section 19 standard in order to obtain monetary damages for a first-time offender. Another important issue under consideration is the scope of new legislation. Will it apply retroactively? Will it include a statute of limitations for enforcement actions? Moreover, it is possible that new FTC legislation could address issues beyond Section 13 remedies by, for example, setting new nationwide data privacy rules or altering the standards or burdens of proof for merger control.

Legislative work already began last year in anticipation of the *AMG* decision. In the 2019–2020 Congressional session, Senators Roger Wicker (R-MS), John Thune (R-SD), Deb Fischer (R-NE), and Marsha Blackburn (R-TN) sponsored the Setting an American Framework to Ensure Data Access, Transparency, and Accountability (SAFE DATA) Act. Among other initiatives, the SAFE DATA Act proposed to reform Section 13(b) of the FTC Act to explicitly include monetary remedies such as disgorgement and restitution.⁵⁴ Senator Wicker noted that he had explicitly included the Section 13(b) reform in the SAFE DATA Act because of the then-forthcoming *AMG* decision.⁵⁵ In the current session, Representative Tony Cárdenas (D-CA) has similarly proposed reforms to Section 13(b) that would provide for the FTC to collect monetary relief in the form of restitution and disgorgement as part of the Consumer Protection and Recovery Act.⁵⁶ Additionally, Senator Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act of 2021, which expands civil penalties under the Sherman, Clayton, and FTC Acts and directs the FTC to publish guidelines in conjunction with the Attorney General regarding civil penalties.⁵⁷

Current and former FTC Commissioners from both sides of the aisle have supported legislative initiatives to provide the FTC with monetary relief powers under Section 13(b). On October 22, 2020, all five FTC Commissioners sent a letter to leadership in the Senate Committees on Energy and Commerce and Commerce, Science, and Transportation, stating that Section 13(b) "is a critical tool" for the FTC to enforce its consumer protection mandate, and that Section 13(b) is the "primary and most effective way" of providing

consumers with monetary restitution. The Commissioners noted that the FTC had been able to recover billions of dollars in consumer injury relief efforts under Section 13(b).⁵⁸

Congress held several hearings regarding Section 13(b) in late April 2021, both before and after the Supreme Court issued its decision in *AMG*. Members of the Senate and FTC Commissioners discussed Section 13(b) at the April 20, 2021 Senate Commerce, Science, and Transportation Committee Hearing on Strengthening the Federal Trade Commission's Authority to Protect Consumers. In her opening remarks, then-Acting Chair Rebecca Slaughter urged Congress to enact Section 13(b) reforms, noting that the FTC would decelerate enforcement actions and would not be able to provide adequate consumer relief without the ability to collect restitution available under Section 13(b). Commissioner Noah Phillips argued that Section 13(b) monetary restitution provides an equitable remedy that benefits consumers rather than penalizes businesses. Commissioner Chopra added that Section 13(b) monetary relief is not considered a penalty because the FTC could only seek the amount defrauded as restitution under the statute. He urged the Senate to consider further remedies without disrupting business expectations. Commissioner Christine Wilson further stated that Congress could set parameters around disgorgement under Section 13(b) to create business certainty. Senator Maria Cantwell (D-WA), Committee Chair, stressed the importance of enacting the "right legal framework" as a replacement for Section 13(b), but promised to propose reforms with Commissioner input.⁵⁹

On April 27, 2021, then-Acting Chair Slaughter testified before the House Committee on Energy and Commerce on the Consumer Protection and Recovery Act. In her written testimony, Slaughter noted that the FTC was able to recover monetary relief for victims of fraud related to the COVID-19 pandemic under Section 13(b), and reiterated the importance of Section 13(b) in obtaining monetary restitution.⁶⁰ At the hearing, she called for "quick Congressional action" to pass the Consumer Protection and Recovery Act, arguing that defendants would have "little incentive" to provide restitution to consumers without Section 13(b) reform. Representative Frank Pallone (D-NJ) stated that Congress must act to enable the FTC to provide monetary relief under Section 13(b) because alternative FTC powers are "too weak" or would not expeditiously grant relief. Then-Acting Chair Slaughter also noted at the hearing that restitution is more cumbersome under Section 19 of the FTC Act, and that civil penalties penalize entities rather than provide restitution for consumers.⁶¹

There has also been discussion regarding setting parameters around the FTC's Section 13(b) powers similar to those imposed under Section 19. In his testimony on the Consumer Protection Act, Howard Beales, a former Director of the Bureau of Consumer Protection, stated that Congress should explicitly set limits on use of Section 13(b), such that the FTC would be able to pursue restitution under

Section 13(b) only pursuant to Section 19's higher proof standards. Representative Gus Bilirakis (R-FL) noted that he was concerned that the Consumer Protection and Recovery Act might lead to reduced due process, to which Professor Beales responded that adoption of Section 19 standards would ensure that the FTC would only recover restitution for what a reasonable person would know to be clearly fraudulent behavior.⁶² Additionally, the U.S. Chamber of Commerce wrote in opposition to the Consumer Protection and Recovery Act, arguing that the Act does not include a "reasonable person test" that would limit liability similar to Section 19 of the FTC Act, that private plaintiffs may already seek monetary remedies through private litigation, and that the Department of Justice would not have similar remedial powers.⁶³

In sum, while there appears to be a measure of bipartisan support for legislation to expand the FTC's authority to obtain monetary relief in reaction to *AMG*, debate among lawmakers is ongoing.

Conclusion

The Supreme Court's *AMG* decision is a dramatic development, and a fascinating example of how the rule of law can be applied with highly consequential effects, in this case overturning legal principles that a prominent federal agency had asserted and leveraged in enforcement actions against hundreds of companies and individuals for decades. Precisely what effects the Supreme Court's decision will have on current and future FTC matters, the agency's enforcement programs, and the possibility for new statutory authority all remains to be seen. What does seem clear is that the Commission's consumer protection and antitrust enforcement agendas in the coming years will remain highly active, and one can expect that the FTC—an agency whose lawyers' creativity established and leveraged a remarkably expansive reading of Section 13(b) in the first place—will find ways to ensure that this legal setback does not frustrate the agency's ability to continue pursuing its core mission. ■

¹ 141 S. Ct. 1341 (2021).

² 815 F.3d 593 (9th Cir. 2016).

³ *Id.* at 597 (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)).

⁴ *FTC v. Ross*, 743 F.3d 886, 890–92 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365–66 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Comm'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468–70 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991).

⁵ David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, ANTITRUST, Fall 2016, at 89.

⁶ 137 S. Ct. 1635 (2017).

⁷ M. Sean Royall, Richard H. Cunningham & Ashley Rogers, *Are Disgorgement's Days Numbered? Kokesh v. SEC May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, ANTITRUST, Spring 2018, at 94.

- ⁸ 910 F.3d 417 (9th Cir. 2018).
- ⁹ *Id.* at 429–37 (O’Scannlain, J., concurring).
- ¹⁰ 937 F.3d 764 (7th Cir. 2019).
- ¹¹ *Id.* at 785.
- ¹² See M. Sean Royall, Richard H. Cunningham, Olivia Adendorff, & Ashley Rogers, *Seventh Circuit Sets Up Potential Supreme Court Review of FTC Monetary Relief Authority*, ANTITRUST, Fall 2019, at 54.
- ¹³ 875 F.2d 564 (7th Cir. 1989).
- ¹⁴ *Id.* at 571–72.
- ¹⁵ *Kokesh*, 137 S. Ct. at 1643–44.
- ¹⁶ See *id.*; *Tull v. United States*, 481 U.S. 412, 424 (1987).
- ¹⁷ Opening Brief of Relief Defendants-Appellants at 89, 90, *FTC v. AMG Capital Mgmt., LLC*, No. 16-17197 (9th Cir. July 21, 2017), ECF No. 14.
- ¹⁸ *Id.*
- ¹⁹ *AMG Capital Management*, 910 F.3d at 437.
- ²⁰ *Credit Bureau Center*, 937 F.3d at 766–67 (affirming issuance of permanent injunction but vacating restitution award).
- ²¹ *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d. Cir. 2020).
- ²² *AMG Capital Management*, 141 S. Ct. at 1343.
- ²³ *Id.* at 1348.
- ²⁴ *Id.* at 1349.
- ²⁵ Transcript of Oral Argument at 50, *AMG Capital Management LLC v. FTC*, 141 S. Ct. 1341 (2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-508_3f14.pdf.
- ²⁶ *Id.* at 53.
- ²⁷ *Id.* at 37.
- ²⁸ 328 U.S. 395 (1946).
- ²⁹ 361 U.S. 288 (1960).
- ³⁰ *AMG Capital Management*, 141 S. Ct. at 1350 (internal quotation marks omitted).
- ³¹ *Id.* at 1351.
- ³² *Id.* at 1350.
- ³³ *Id.* (internal quotation marks omitted).
- ³⁴ No. 18-cv-62593 (S.D. Fla. 2018).
- ³⁵ *Id.* Dkt. No. 420 at 1–2 (quoting 15 U.S.C. §57b(b)).
- ³⁶ Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter at the Apr. 27, 2021 hearing on The Urgent Need to Fix Section 13(b) of the FTC Act Before the United States House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, https://www.ftc.gov/system/files/documents/public_statements/1589456/opening_statement_april_27_house_13b_hearing_427.pdf.
- ³⁷ D.C. No. 5:18-dv-02104-DMG-PLA (9th Cir. Apr. 28, 2021), Dkt. No. 44.
- ³⁸ See, e.g., *The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers, Hearing Before the Subcomm. on Consumer Protection and Commerce of the H. Comm. on Energy and Commerce*, 117th Cong. (2021) (statement of Rebecca Slaughter, Comm’r and Acting Chair of the Fed. Trade Comm’n).
- ³⁹ Press Release, Fed. Trade Comm’n, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go to Purchasers Affected by Anticompetitive Tactics* (May 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.
- ⁴⁰ 994 F.2d 595 (9th Cir. 1993).
- ⁴¹ Press Release, Fed. Trade Comm’n, *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency’s Rules of Practice* (Apr. 27, 2009), <https://www.ftc.gov/news-events/press-releases/2009/04/ftc-issues-final-rules-amending-parts-3-4-agencys-rules-practice>.
- ⁴² See 15 U.S.C. § 45(l).
- ⁴³ Transcript of Comm. Hearing at 30, S. Com., Sci., and Transp. Comm. Hearing on Strengthening the Federal Trade Commission’s Authority to Protect Consumers (Apr. 20, 2021), Bloomberg Gov’t Transcripts (Apr. 21, 2021, 12:41 PM) [hereinafter *Strengthening the FTC Hearing Transcript*].
- ⁴⁴ *Id.* at 10.
- ⁴⁵ 16 C.F.R. § 312.
- ⁴⁶ 16 C.F.R. § 318.
- ⁴⁷ 16 C.F.R. § 315.
- ⁴⁸ Joint Statement of Comm’r Chopra and Comm’r Slaughter Concurring in Part, Dissenting in Part, In the Matter of Flo Health, Inc., FTC File No. 1923133 (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rcrks_statement_on_flo.pdf.
- ⁴⁹ Press Release, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.
- ⁵⁰ *Id.*
- ⁵¹ Press Release, Fed. Trade Comm’n, *Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.
- ⁵² Prepared Remarks of Commissioner Rohit Chopra at the Jan. 7, 2021 Truth in Advertising Event on the FTC’s Remedial Authority, https://www.ftc.gov/system/files/documents/public_statements/1589068/20210413_remarks_of_commissioner_chopra_at_tina.pdf.
- ⁵³ No. 2:21-cv-04155 (C.D. Cal. 2021).
- ⁵⁴ Press Release, U.S. S. Comm. on Com., Sci., and Transp., Wicker, Thune, Fischer, Blackburn Introduce Consumer Data Privacy Legislation (Sept. 17, 2020), <https://www.commerce.senate.gov/2020/9/wicker-thune-fischer-blackburn-introduce-consumer-data-privacy-legislation>; S. 4626, 116th Cong. § 4 (2020).
- ⁵⁵ *Strengthening the FTC Hearing Transcript*, *supra* note 42, at 4.
- ⁵⁶ H.R. 2668, 117th Cong. § 2 (2021).
- ⁵⁷ S. 225, 117th Cong. §§ 2(b)(6), at 9–12 (2021).
- ⁵⁸ Letter from Joseph J. Simons, FTC Chairman et al. to the Honorable Frank Pallone, Jr., Chairman, Committee on Energy and Commerce, of the U.S. House of Representatives et al. (Oct. 22, 2020), <https://www.allaboutadvertisinglaw.com/wp-content/uploads/sites/21/2020/11/FTC-Letter-to-Energy-and-Commerce-Committee-Letters.pdf>.
- ⁵⁹ *Strengthening the FTC Hearing Transcript*, *supra* note 43, at 7–11, 18.
- ⁶⁰ Prepared Statement of the Federal Trade Commission: The Urgent Need to Fix Section 13(b) of the FTC Act, before the Comm. on Energy and Commerce Subcomm. on Consumer Protection and Commerce, United States House of Representatives (Apr. 27, 2021), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Slaughter_CPC_2021.04.27.pdf.
- ⁶¹ Transcript of Committee Hearing at 4–5, 10–11, 16–17, 30 House Energy and Com. Comm., Consumer Protection and Commerce Subcommittee Hearing on the Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers (Apr. 27, 2021), Bloomberg Gov’t Transcripts (Apr. 28, 2021, 12:30 PM).
- ⁶² *Id.* at 44, 48–49.
- ⁶³ Letter from Neil L. Bradley, Executive Vice President & Chief Policy Officer, Chamber of Commerce of the United States of America to the Honorable Janice Schakowsky, Chair, Subcommittee on Consumer Protection and Commerce, U.S. House of Representatives, and the Honorable Gus M. Bilirakis, Ranking Member, Subcommittee on Consumer Protection and Commerce, U.S. House of Representatives (Apr. 26, 2021), https://www.uschamber.com/sites/default/files/210426_ftcauthority_houseec.pdf.